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**UNITED STATES BANKRUPTCY COURT  
 DISTRICT OF NEVADA**

In re:

Case No. 21-11271-abl  
 Chapter 11

MEDOLAC LABORATORIES, A PUBLIC  
 BENEFIT CORPORATION,

Debtor.

Date: OST REQUESTED  
 Time: OST REQUESTED

**DEBTOR’S EMERGENCY MOTION PURSUANT TO 11 U.S.C. §§ 105(a) AND 366  
 FOR AN ORDER DETERMINING THAT ADEQUATE ASSURANCE HAS BEEN  
 PROVIDED TO UTILITY COMPANIES, AND FOR APPROVAL OF PROCEDURES**

Medolac Laboratories, a Delaware public benefit corporation, as debtor and debtor in possession (the “Debtor” or “Medolac”), submits its emergency motion (the “Motion”) pursuant to 11 U.S.C. §§ 105(a) and 366 for an order determining that adequate assurance has been provided to utility companies. This Motion is made and based on the points and authorities herein, the *Omnibus Declaration of Elena M. Medo in Support of Chapter 11 Petition, Initial Emergency Motions, and Related Relief* (the “Omnibus Declaration”), the papers and pleadings on file herein, judicial notice of which is requested, and any arguments of counsel entertained by the Court at the time of the hearing on this Motion.

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## **Introduction**

1  
2 1. Medolac is a Delaware public benefit corporation (“PBC”) with a principal place  
3 of business located at 1031 Boulder City Parkway, Boulder City, Nevada 89005. Medolac  
4 processes human milk products utilizing proven food-processing methods to produce the first  
5 sterile human milk-based nutrition that is shelf-stable at room temperature. Medolac was the  
6 first milk bank legally classified as a PBC. A more detailed description of the Debtor, its  
7 business, and its reasons for filing for bankruptcy is contained in the Omnibus Declaration.

8 2. On March 17, 2021 (the “Petition Date”), Medolac filed its voluntary petition for  
9 relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”), thereby  
10 commencing its bankruptcy case (the “Chapter 11 Case”). The Debtor is a “small business  
11 debtor” pursuant to section 101(51D) of the Bankruptcy Code and has elected to proceed under  
12 Subchapter V. The Debtor is authorized to continue operating its business as a debtor in  
13 possession pursuant to sections 1182 and 1184 of Subchapter V of chapter 11 of the Bankruptcy  
14 Code. Brian D. Shapiro has been appointed as Subchapter V trustee for the Debtor’s Chapter 11  
15 Case [ECF No. 7].

## **Jurisdiction and Venue**

16  
17 3. The Court has subject matter jurisdiction to consider and determine this matter  
18 pursuant to 28 U.S.C. §§ 157 and 1334, and Local Rule 1001(b)(1). This is a core proceeding  
19 pursuant to 28 U.S.C. § 157(b). Pursuant to LR 9014.2, the Debtor consents to the entry of final  
20 orders and judgments by the bankruptcy judge. Venue is proper before this Court pursuant to 28  
21 U.S.C. §§ 1408(1) and 1409(a).

## **Statement of Facts**

22  
23 4. In the ordinary course of operating the Debtor’s business, the Debtor incurs utility  
24 expenses for water and sewer, electricity, natural gas, and waste management. In particular, the  
25 Debtor has an approximately 47,000 square foot facility that includes multiple large walk-in  
26 refrigerators and other large equipment used in the storage and processing of its raw materials  
27 and products. These utility services are provided by the utilities (as such term is used in section  
28 366 of the Bankruptcy Code, collectively, the “Utility Providers”), and inclusive of water/sewer,

1 electric, natural gas, internet, telephone, and waste removal. On average, the Debtor expends  
2 approximately \$9,000.00, in the aggregate, each month on utility costs. As of the Petition Date,  
3 the Debtor is current on nearly all of its utility obligations owed to its current utility providers,  
4 and except for accrued amounts with other utility providers that have not been billed as of yet.  
5 Additionally, the Debtor already has an \$800.00 balance on deposit with Southwest Gas, and a  
6 \$845.00 balance on deposit with The City of Boulder City (for electric and water/sewer).  
7 Accordingly, the Debtor has some existing deposits on hand that provide certain utility vendors  
8 with adequate protection.

9 5. Preserving utility services on an uninterrupted basis is essential to the Debtor's  
10 ongoing operations and, therefore, to the success of its reorganization. Any interruption of utility  
11 services, even for a brief period of time, would disrupt the Debtor's ability to continue  
12 maintaining its stores, thereby negatively affecting customer relationships, revenues and profits.  
13 Such a result could jeopardize the Debtor's reorganization efforts and, ultimately, value and  
14 creditor recoveries. It is therefore critical that utility services continue uninterrupted during the  
15 Chapter 11 Case.

16 6. The Debtor intends to pay its post-petition utility obligations owed to the Utility  
17 Providers in a timely manner and keep them current on a go forward basis from and after the  
18 Petition Date. The Debtor expects that it will have access to such funds from operations, as well  
19 as access to debtor in possession financing to pay post-petition obligations to the Utility  
20 Providers. Given the monthly obligations to Utility Providers, the Debtor asserts that there is no  
21 need to provide any additional assurance of payment for future services to the Utility Providers  
22 that did not hold deposits from the Debtor on the Petition Date.

23 7. Given the long account history, and the monthly obligations to the Utility  
24 Providers, the Debtor asserts that there is no need to provide any additional assurance of payment  
25 for future services to the Utility Providers who did not hold deposits from the Debtor on the  
26 Petition Date.

27 8. Notwithstanding the Proposed Adequate Assurance for the Utility Providers, if  
28 the Utility Providers are not satisfied that they have received adequate assurance of future

1 payment, the Debtor proposes the following procedures (the “Procedures”) under which such  
 2 dissatisfied Utility Provider may make additional requests for adequate assurance:

3 a. If a Utility Provider is actually served with the order approving this  
 4 Motion, which service of the order shall be within two (2) days of its entry, is not  
 5 satisfied with the assurance of future payment provided by the Debtor, the Utility  
 6 Provider must serve a detailed written request (a “Request”) so that it is actually received  
 7 within fifteen (15) days of the date of the entry of the order granting this Motion (the  
 8 “Request Deadline”) requesting what additional protections it believes are necessary and  
 9 appropriate under the circumstances.

10 b. Without further order of the Court, the Debtor may enter into agreements  
 11 granting additional adequate assurance to a Utility Provider serving a timely Request if  
 12 the Debtor, in its discretion, determines that the Request is reasonable or if the parties  
 13 negotiate alternate consensual provisions.

14 c. If the Debtor believes that a Request is unreasonable, the Debtor shall file  
 15 a motion pursuant to section 366(c) of the Bankruptcy Code (a “Determination Motion”)   
 16 within fifteen (14) days after the Request Deadline. The Determination Motion shall  
 17 seek a determination from the Court that the Utility Deposit account, plus any additional  
 18 consideration offered by the Debtor, constitutes adequate assurance of payment. Pending  
 19 notice and a hearing of the Determination Motion, the Utility Provider that is the subject  
 20 of the Determination Motion may not alter, refuse or discontinue services to the Debtor,  
 21 or recover or set off against a prepetition deposit.

22 d. Any Utility Provider actually and timely served with the order approving  
 23 this Motion that fails to make a timely Request shall be deemed to be satisfied that the  
 24 Debtor’s Deposits and Proposed Adequate Assurance provides adequate assurance of  
 25 payment to such Utility Provider within the meaning of section 366 of the Bankruptcy  
 26 Code, and shall further be deemed to have waived any right to seek additional adequate  
 27 assurance during the course of this Chapter 11 Case.

28 9. The Debtor further requests that all Utility Providers be prohibited from altering,

1 refusing, or discontinuing utility services to the Debtor absent further order of the Court.

2 **Legal Authority**

3 10. Section 366(c)(2) of the Bankruptcy Code, as amended in 2005, addresses utility  
4 services to a Chapter 11 debtor. See 11 U.S.C. § 366(c)(2). Specifically, section 366(c)(2) of  
5 the Bankruptcy Code provides that a utility may alter, refuse, or discontinue service if, within  
6 thirty (30) days after a Chapter 11 filing, such utility has not received an adequate “assurance of  
7 payment” that is satisfactory to the utility. See 11 U.S.C. § 366(c)(2).

8 11. Section 366(c)(1)(A) of the Bankruptcy Code provides that the term “assurance of  
9 payment” means: “(i) a cash deposit; (ii) a letter of credit; (iii) a certificate of deposit; (iv) a  
10 surety bond; (v) a prepayment of utility consumption; or, (vi) another form of security that is  
11 mutually agreed on between the utility and the debtor or trustee.” Id. § 366(c)(1)(A). Thus,  
12 since section 366(c) of the Bankruptcy Code specifies the form of assurance that will be deemed  
13 adequate, a determination of the amount of assurance that must be provided falls squarely within  
14 the court’s discretion. See id. § 366(c)(3)(A) (“A court may, after request of a party in interest  
15 and after notice and hearing, modify the amount of adequate assurance payment required.”); see  
16 also In re Haven Eldercare, LLC, No. 07-32720, 2008 WL 139543, at \*2 (Bankr. D. Conn. Jan.  
17 10, 2008) (court modified the amount of adequate assurance to equal a cash deposit in an amount  
18 equal to that debtor’s average monthly invoice over the last 12 months); In re Viking Offshore  
19 (USA) Inc., No. 08-31219-H3-11, 2008 WL 782449, at \*3 (Bankr. S.D. Tex. Mar. 20, 2008)  
20 (“The structure of Section 366 is such that, if [d]ebtors are unable to provide an offer of adequate  
21 assurance satisfactory to the utility, the utility may insist on a different amount, subject to a  
22 determination by the court.”).

23 12. While the court has discretion in determining the amount of assurance, such  
24 discretion is not limitless. Section 366(c)(3)(B) of the Bankruptcy Code lists certain factors that  
25 a court may not consider. Specifically, courts may no longer consider: (i) the absence of a  
26 security deposit before a debtor’s petition date; (ii) a debtor’s history of timely payments; or (iii)  
27 the availability of an administrative expense priority.

28 13. Nonetheless, a court’s discretion under section 366(c) of the Bankruptcy Code is

1 nearly identical to the discretion it has under section 366(b). Compare 11 U.S.C. § 366(b) (“On  
 2 request of a party in interest and after notice and a hearing, the court may order reasonable  
 3 modification of the amount of the deposit or other security necessary to provide adequate  
 4 assurance of payment”), with 11 U.S.C. § 366(c)(3)(A) (“On request of a party in interest and  
 5 after notice and a hearing, the court may order modification of the amount of an assurance  
 6 payment under paragraph (2).”).

7 14. Courts construing section 366(b) of the Bankruptcy Code have long recognized  
 8 that adequate assurance does not constitute an absolute guaranty of the debtor’s ability to pay.  
 9 See In re Steinebach, 303 B.R. 634, 641 (Bankr. D. Ariz. 2004) (“Adequate assurance of  
 10 payment is not, however, absolute assurance. . . . a Bankruptcy Court is not required to give a  
 11 [Utility Provider] the equivalent of a guarantee of payment, but must only determine that the  
 12 utility is not subject to any unreasonable risk of non-payment for postpetition services.”) (citing  
 13 In re Adelphia Bus. Solutions, Inc., 280 B.R. 63, 80 (S.D.N.Y. 2002); see also Va. Elec. &  
 14 Power Co. v. Caldor, Inc.-N.Y. (In re Caldor, Inc.-N.Y.), 199 B.R. 1, 3 (S.D.N.Y. 1996), aff’d,  
 15 117 F.3d 646 (2d Cir. 1997) (“Section 366(b) requires a Bankruptcy Court to determine whether  
 16 the circumstances are sufficient to provide a utility with ‘adequate assurance’ of payment. The  
 17 statute does not require an ‘absolute guaranty of payment.’”).

18 15. Courts have recognized that, in analyzing the requisite level of adequate  
 19 assurance, they should “focus upon the need of the utility for assurance, and to require that the  
 20 debtor supply no more than that, since the debtor almost perforce has a conflicting need to  
 21 conserve scarce financial resources.” Caldor, Inc.-N.Y., 117 F.3d at 650 (citing In re Penn  
 22 Jersey Corp., 72 B.R. 981 (Bankr. E.D. Pa. 1987)).

23 16. It is also well-established that section 366(b) of the Bankruptcy Code permits a  
 24 court to find that no adequate assurance payment whatsoever may be required. See id. at 650  
 25 (“Even assuming that ‘other security’ should be interpreted narrowly, . . . a bankruptcy court’s  
 26 authority to ‘modify’ the level of the ‘deposit or other security’ provided for under § 366(b),  
 27 includes the power to require ‘no deposit or other security’ where none is necessary to provide a  
 28 utility supplier with ‘adequate assurance of payment.’”). This principle may be applicable in

1 cases where the debtor has made prepetition deposits or prepayments for services that utilities  
2 will ultimately render post-petition. See 11 U.S.C. § 366(c)(1)(A)(v) (recognizing a prepayment  
3 for post-petition services as adequate assurance). Accordingly, even after BAPCPA's revisions  
4 to section 366 of the Bankruptcy Code, courts continue to have discretion to determine the  
5 amount of adequate assurance payments and, where appropriate, to determine that no such  
6 payment is necessary.

7 17. The Debtor believes it will have sufficient resources to pay, and intends to pay, all  
8 valid post-petition utility obligations for utility services in a timely manner. In addition, the  
9 Debtor has a powerful incentive to stay current on its utility obligations because of the Debtor's  
10 reliance on utility services for the operation of its cleaning and sanitizing equipment. These  
11 factors, which the Court may (and should) consider when determining the amount of any  
12 adequate assurance payments, justify a finding that no adequate assurance payment is required in  
13 this Chapter 11 Case (the "Proposed Adequate Assurance"). In light of the foregoing, the Debtor  
14 respectfully submits that the Proposed Adequate Assurance for the Utility Providers are more  
15 than sufficient to assure the Utility Providers of future payment.

16 18. Moreover, if a Utility Provider disagrees with the Debtor's analysis, the  
17 Procedures will enable the parties to negotiate and, if necessary, seek Court intervention without  
18 jeopardizing the Debtor's continuing operations. If a Utility Provider fails to timely file a  
19 Request in accordance with the Procedures, however, such Utility Provider shall be deemed to  
20 consent to the Procedures and shall be bound by any order approving this Motion. See In re  
21 Syroco, Inc., No. 07-04091, 2007 WL 2404295, at \*2 (Bankr. D.P.R. 2007) (a utility provider's  
22 lack of objection, response or counter-demand after receiving notice of hearing on utilities  
23 motion, notice of interim order and notice of final hearing constitutes tacit acceptance of the  
24 debtor's Proposed Adequate Assurance.

25 19. The proposed Procedures are necessary for the Debtor to carry out its  
26 reorganization efforts. If such Procedures are not approved, the Debtor could be forced to  
27 address a volume of requests by its Utility Providers during the critical first weeks of its  
28 reorganization. Moreover, the Debtor could be blindsided by a Utility Provider unilaterally

1 deciding--on or after the 30th day following the Petition Date--that it is not adequately protected  
2 and discontinuing service or making an exorbitant demand for payment to continue service.  
3 Discontinuation of utility service would force operations to cease, and such disruption of  
4 operations could place the Debtor's reorganization efforts in jeopardy.

5 **Reservation of Rights**

6 20. Nothing contained herein is intended or should be construed as an admission as to  
7 the validity of any claim against the Debtor, a waiver of the Debtor's rights to dispute any claim,  
8 or an approval or assumption of any agreement, contract, or lease under section 365 of the  
9 Bankruptcy Code. The Debtor expressly reserves its rights to contest any invoice of a Utility  
10 Provider under applicable non-bankruptcy law. Likewise, if this Court grants the relief sought  
11 herein, any payment made pursuant to the Court's order is not intended and should not be  
12 construed as an admission as to the validity of any claim or a waiver of the Debtor's rights to  
13 dispute such claim subsequently.

14 ...

15 ...

16 ...



**Conclusion**

WHEREFORE, the Debtor requests that the Court grant this Motion, thereby: (i) determining that its Utility Providers have been provided with adequate assurance of payment within the meaning of section 366 of the Bankruptcy Code; (ii) approving the Debtor's proposed Procedures whereby Utility Providers may request additional or different adequate assurance; (iii) prohibiting the Utility Providers from altering, refusing, or discontinuing services on account of prepetition amounts outstanding and on account of any perceived inadequacy of the Debtor's Proposed Adequate Assurance; (iv) determining that the Debtor is not required to provide any additional adequate assurance beyond what is proposed by this Motion; and (v) granting the Debtor such other and further relief as is just and proper.

Dated: March 18, 2021.

By: /s/ Matthew C. Zirzow  
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